No. 18-72416

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

*Petitioner*,

v.

LUCKY CAB COMPANY,

*Respondent*.

APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

# RESPONDENT LUCKY CAB COMPANY'S REPLY BRIEF

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## INTRODUCTION

The National Labor Relations Board (the "Board") continues its pattern (which began in the proceedings below) of ignoring the standards applicable to backpay calculations. For example, it consistently holds that interim wages (which reduce a respondent's backpay obligations) can be adjusted to account for the discriminatee's employment related expenses only if the respondent would have paid for such expenses. Yet here, it concludes that the drivers are entitled to offsets for food expenses, even though Lucky Cab never paid for its employees' meals. It is irrelevant that some self-employed individuals may reduce their tax burden by deducting meal expenses. IRS tax deductions do not constitute a dispositive factor. Because this Court may set aside decisions where the Board incorrectly applies the law, the Board's petition should be denied.

Further, the Board incorrectly applied the law and supported its conclusion with something far less than the requirement of "substantial evidence" when it determined that other available cab driver positions were not substantially equivalent to Lucky Cab's cab driver positions.

At the same time it necessarily concluded that a number of entirely unrelated jobs were substantially equivalent to a cab driver position. It accomplishes this feat by essentially ignoring the "substantially equivalent" standard. In applying its highly strained conclusion, the Board determined that one employee, Almethay Geberselasa, exercised a reasonable effort to find substantially similar employment, even though she remained unemployed for two years while cab driver jobs were available.

Considering the record as a whole, the Board's backpay calculations misapply the law and are not supported by substantial evidence. The Petition should be denied, or alternatively, amended to conform to the law and the evidence.

## ARGUMENT

### I.

### THE BOARD ERRED BY DEDUCTING MEAL EXPENSES FROM THE SELF-EMPLOYED EARNINGS OF FORMER DRIVERS

The Board observes that "[t]he use of net earnings for the purposes of mitigation when discriminatees are self-employed reflects the

fact that the self-employed bear their own costs." (A.B. 31). While generally true, this ignores that most people bear their own costs to eat, whether traditionally employed, self-employed, or unemployed. And while some meal expenses may be deductible from gross income for tax purposes, this does not conclusively establish that such expenses should be offset from a discriminatee's interim wages to increase the backpay due from a former employer. This is because IRS tax deductions are not the test for backpay, nor are they a dispositive factor.

Instead, the Board must show that any purported offsets to interim wages (1) resulted from "obtaining and maintaining" the interim employment and (2) would not have been reimbursed at the prior employment had they been incurred. *Cimpi Transp. Co.*, 266 NLRB 1054, 1055 (1983); *see also Aircraft & Helicopter Leasing*, 227 NLRB 644 (1976) (holding that "expenses incurred by discriminatees in connection with obtaining or holding interim employment, which would not have been incurred but for the discrimination" are deductible); *N.L.R.B. v. Velocity Exp., Inc.*, 434 F.3d 1198, 1202 (10th Cir. 2006) (recognizing that the NLRB does not offset expenses employees would have incurred while working at the respondent employer).

Here, the NLRB incorrectly applied the law as it relates to both elements. First, the need for food did not result from obtaining and maintaining the drivers' interim employments. And second, Lucky Cab did not reimburse its drivers for food costs. The Court should deny the petition, or alternatively, amend it to conform to the law.[1]

### A. The Drivers' Need to Eat Was Not a Job-Connected Expense

A discriminatee is only entitled to an offset for "such reasonable expenses he may have incurred in obtaining and maintaining [the interim] employment." *Id.* The expenses must have been "incurred in connection with having to take a job." *See id.* Just like the drivers for Lucky Cab needed to find and pay for food in between driving passengers around southern Nevada, truck drivers also need to eat while ferrying loads from place to place. But this hunger is not connected with truck driving any more than it is connected with driving a taxi cab. Paying for food is not an expense incurred in connection with taking a job. The Board incorrectly applied the law.

[1] Lucky Cab describes the proposed amendments on page 22 of its opening brief.

The Board attempts to support its counterarguments with inapposite cases that do not pertain to the cost of meals, expenses which every person necessarily incurs in life, self-employed or not.

### *1.* Ryder System, Inc.

The Board correctly observes that the depreciation of assets is an allowable offset to interim income, as discussed in *Ryder Systems, Inc.*, 302 NLRB 608 (1991). (A.B. 34). Though asset depreciation can be a direct cost of self-employment, eating food is not. Everyone must eat. The Board does not explain how asset depreciation is comparable to an individual's need to eat.

### *2.* C. R. Adams Trucking, Inc.

The Board also cites to *C. R. Adams Trucking*, 272 NLRB 1271, 1277 (1984), which allowed an offset for "tools and equipment" used for a self-employment venture. (A.B. 34). But there, the "tool" was a truck that the discriminatee used to haul sand and gravel and was essential to his interim employment. *C. R. Adams Trucking*, 272 NLRB at 1271. The decision did not discuss offsets for food, an expense entirely unrelated to self-employment.

This is not a situation—like those in the Board's cited authority—where the former employees accepted interim employment that required them to incur expenses to accept the employment. This is not about the purchase of tools. This is not about depreciation of assets used to facilitate the employment. This is about food.

### B. The Drivers Cannot Offset Meal Expenses Because They Incurred Those Same Expenses at Lucky Cab

#### *1. Former Employees May Offset Interim Wages with Employment Related Expenses Only if the Respondent Employer Compensated for Those Same Expenses*

"[J]ob-related expenses which would have been incurred and not reimbursed had [the discharged employee] continued to work for Respondent *are not* deductible." *Cimpi Transp. Co.*, 266 NLRB 1054, 1055 (1983) (emphasis added);[2] *accord Aircraft & Helicopter Leasing*, 227

[2] The Board attempts to distinguish *Cimpi* by stating that *Cimpi* did not address a situation where the discriminatee mitigated his losses through self-employment. (A.B. 36). However, the rule allowing offsets for certain employment related expenses is not dependent on the nature of the employment. *See Cliffstar Transp. Co.*, 311 NLRB 152, 169 (1993) (offsetting self-employment income with several employment related expenses); *Ryder Sys., Inc.*, 302 NLRB 608 (allowing an offset to interim earnings for depreciation of an asset purchased for use in the discriminatee's self-employment); *In Brown Co.*, 305 NLRB 62 (1991) (offsetting self-employment wages for expenses of operating a tractor).

NLRB 644 (holding that "expenses incurred by discriminatees in connection with obtaining or holding interim employment, which would not have been incurred but for the discrimination" are deductible). This is not a fringe proposition. Indeed, it is "settled law that [the NLRB] does not 'deduct from the gross backpay those expenses that employees would have incurred had they not been unlawfully discharged.'" *Velocity Exp., Inc.*, 434 F.3d at 1202 (quoting the NLRB's decision and order). Curiously, the Board cites to *Ryder Systems Inc.*, where it allowed the discriminatee to recover backpay for a meal allowance provided by the respondent employer because (unlike here) the respondent paid for meals as a part of its standard compensation. *Ryder Sys., Inc.* 302 NLRB at *1.

As the Board concedes, "[a] backpay award is a make-whole remedy." A.B. 18. In other words, a backpay award should not result in a windfall to the discharged employee. *See, e.g., Johnson v. Martin,* 473

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Moreover, *Cimpi* only addressed self-employment when considering whether a discriminatee can mitigate his damages, at all, through self-employment (not whether expenses can be offset). *Cimpi Transp. Co.*, 266 NLRB at *4. Thus, if the Board wants to press this issue, the logical conclusion is that, here, the former drivers failed to mitigate their losses through their interim self-employment.

F.3d 220, 222 (5th Cir. 2006) ("Under the ADEA, '[c]ourts uniformly offset interim earnings from back pay awards in order to make the plaintiff whole, yet avoid windfall awards.'" (quoting *Stephens v. C.I.T. Group/Equip. Fin., Inc.*, 955 F.2d 1023, 1028 (5th Cir. 1992)) (alteration in original)); s*ee also Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 188 (1973) (holding that "backpay is aimed at 'restoring the economic status quo that would have obtained but for the company's wrongful refusal to reinstate'" (quoting *N.L.R.B. v. J. H. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258, 263 (1969))).

### *2. The Board Incorrectly Applied the Law When It Offset the Former Drivers' Interim Wages with the Cost of Food*

#### a. LUCKY CAB DID NOT COMPENSATE DRIVERS FOR FOOD

It is undisputed that Lucky Cab did not pay for the meals of its employees.[3] Thus, the former drivers cannot reduce their interim wages for food-related expenses. *See Cimpi Transp. Co.*, 266 NLRB at 1055 ("[J]ob-related expenses which would have been incurred and not

[3] In fact, it is not even certain that the interim employers required the drivers to pay for their own food. As the Board acknowledges in its Answering Brief, one employer (Swift) "hired drivers as employees and paid them a flat rate to cover all expenses." A.B. 35 (emphasis added).

reimbursed had [the discharged employee] continued to work for Respondent are not deductible.") Ironically, the Board has recognized (but is now ignoring) this common-sense principle under similar facts:

> [T]hose expenses he had when he was actually on the road and which were not expenses reimbursed by Respondent should not be set off. Reger testified that Respondent did not reimburse him for meals . . . .
>
> Reger's room and board expenses while in Carey should be set off whereas the meals and lodging expenses that he had while on the road should not.

*Id.* Now, however, the Board chooses to contradict its own precedent. But no amount of the Board's equivocation can alter one key fact: The former drivers paid for their own meals while employed at Lucky Cab. They cannot now seek compensation for meal expenses incurred during their interim employment, whether an independent contractor or not. *Cf. id.* (noting that becoming an "owner-operator" of a truck "is not really self-employment"). They are not entitled to a windfall.

#### b. THE MERE POSSIBILITY OF ADDED COSTS IS NOT "SUBSTANTIAL EVIDENCE" JUSTIFYING AN INCREASE IN BACKPAY

It is irrelevant that one of the drivers "*could* drive to 48 states" in his interim employment, as the Board asserts. A.B. 35 (emphasis added). Whether the driver remained in Nevada or traveled out of

state, he still must eat. In any event, the possibility that former employee, Edale Hailu, could travel out of state says nothing about (1) how often he did, (2) whether any out-of-state travel increased his food expenditures, or (3) whether any of the other former employees had out-of-state travel requirements. The Board may not support increases to a respondent's backpay obligations with hypothetical evidence. It must support these obligations with substantial evidence.[4] These mere possibilities should be ignored.

### C. Whether an Expense Is Tax-Deductible Might Be a Consideration, But It Is Not the Dispositive Factor

Whether an expense is deductible for federal income tax purposes does not end the analysis. "Though recognizing that tax information may be helpful in determining backpay amounts, we do not require that a remedial award follow what might be deductible were the employee an independent contractor." *N.L.R.B. v. Velocity Exp., Inc.*, 434 F.3d 1198, 1204 (10th Cir. 2006).

To factor into a backpay computation, the expense must also be incurred *because of* the self-employment. *See Cliffstar Transp. Co.*, 311

[4] *See infra* Part II ("umbrella" section).

NLRB 152, 170 (1993) (allowing the discriminatee to offset certain expenses only because the "[e]mployer [did] not establish[] that any of [those] expenses were not incurred in connection with [the] self-employment business"). The expenses must "represent actual [self-employment] costs rather than paper losses incurred for tax purposes." *F.E. Hazard, Ltd. v. N.L.R.B.*, 917 F.2d 736, 738 (2d Cir. 1990).

The Board attempts to shoehorn the holding from *Regional Import & Export Trucking Co., Inc.*, 318 NLRB 816 (1995) to support its argument that "net earnings" is the only criterion relevant to backpay offset determination. (A.B. 31). However, *Regional Import* involved a discriminatee who started a restaurant as an interim business endeavor. *Reg'l Imp.*, 318 NLRB at 818. The Board declined to offset the backpay with the restaurant's gross revenue, because the restaurant operated at a loss, which resulted in its closing and a subsequent bankruptcy. *Id.* That is unlike the situation here, where the former employees seek a windfall from meal expenses that they would have never received had they remained employed by Lucky Cab.

Here, the former drivers did not suddenly develop the need to eat as a result of their interim employment. The Board hangs its hat on the

fact that some meal expenses are deductible under IRS rules. *See* A.B. 32–33. Yet it concedes that Lucky Cab did not pay for its drivers' meals. *Id.* at 34. The Board's own precedent, however, dictates that deductions for meal expenses here are inappropriate. *See, e.g.*, *Cimpi Transp. Co.*, 266 NLRB at 1055 (offsetting interim wages with expenses only if the former employer paid for those expenses); *Velocity Exp., Inc.*, 434 F.3d at 1202 (holding that it is "settled law" that the NLRB only deducts those expenses that would have been incurred at the prior employer). The Board seemingly attempts to reconcile this contradiction by suggesting that perhaps the drivers just did not eat while employed at Lucky Cab. (A.B. 35). This absurd and speculative premise is not only lacking substantial evidence, but is unsupported by any citation to the record. Nevertheless, even if they never ate while on the job (which seems unlikely), they had to eat at some point during the day and pay for their food.

Accordingly, the former drivers are not entitled to the windfall they would receive from the claimed meal deductions, regardless of the taxable status of those expenses. The Board did not cite to a single case where an interim wage deduction was permitted for an expense that

was either (1) not reimbursed by the previous employer or (2) not an expense necessitated by the interim employment. While the taxable status of an expense may factor into the ultimate determination, that status alone cannot override the NLRB's own standard for interim wage calculation.

Because the Board and the administrative law judge "ha[ve] incorrectly applied the law," *California Pac. Med. Ctr. v. N.L.R.B.*, 87 F.3d 304, 307 (9th Cir. 1996), by deducting interim wages for meal expenses for which Lucky Cab never compensated, the Petition should be denied or amended to comply with the law and the Board's own precedent.

## II.

## DEMEKE'S MEAL DEDUCTIONS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Alternatively, if the Court determines that the former drivers are entitled to a deduction for meal expenses not previously reimbursed by Lucky Cab, Elias Demeke's claimed deductions must be adjusted because they are not supported by substantial evidence.

"Findings of fact in a backpay proceeding will be upheld as long as they are supported by substantial evidence, considering the record as a

whole." *Kawasaki Motors Mfg. Corp., U.S.A. v. N.L.R.B.*, 850 F.2d 524, 527 (9th Cir. 1988) (citing *NLRB v. United Bhd. of Carpenters & Joiners of America, Local 1913*, 531 F.2d 424, 426 (9th Cir. 1976)). The Board has the initial burden to establish the gross amount of backpay due. *M Restaurants, Inc. v. N.L.R.B.*, 621 F.2d 336, 337 (9th Cir. 1980). If the Board establishes the gross backpay due with substantial evidence, the burden shifts to the respondent to show facts *limiting* its liability. *United Bhd. of Carpenters*, 531 F.2d at 426. This includes "proving the factual issues warranting a reduction of the gross amount of backpay." *Kawasaki Motors*, 850 F.2d at 527. Thus, once a respondent shows that a discriminatee earned income during interim employment, the respondent has met its burden to reduce its backpay liability.

This burden shifting establishes a pattern where (1) the Board has the burden to establish by substantial evidence facts that *increase* the respondent's liability and (2) the respondent has the burden to show facts that *reduce* its liability. If, as is the case here, the Board seeks to offset the interim wages by suggesting that the employee paid "out of pocket" for job related expenses, it only follows that the Board must

support such offsets with substantial evidence. Such offsets serve to *increase* the respondent's liability.

In this case, the Board's offset to Demeke's interim wages is not supported by substantial evidence—in fact, the evidence shows the Board's offset was wrong.

### A. The Board Does Not Dispute that Demeke's Meal Deductions Are Inflated

The Board dedicates only one paragraph of its Brief to the blatant misrepresentations in Demeke's tax returns, which formed the basis for the Board's meal deduction calculations. (*See* A.B. 36–37). And there, the Board does not dispute that the tax returns misrepresent Demeke's meal expenses. (*See* O.B. 13–14). Nor does it dispute that these tax returns were the primary "evidence" upon which it relied in determining the backpay adjustments for meal expenses. (*See id*). Indeed, the Board does not even refute that Demeke destroyed any purported supporting documents and produced nothing in response to Lucky Cab's subpoena. (*See id.* at 14). Thus, the Board effectively concedes that the increased backpay calculations for Demeke's meal deductions were not based on substantial evidence.

The Board's concession here is not surprising. For example, the Board calculated that, if Demeke drove 300 days in a year and was eligible for the full IRS per diem meal rate $59 per day x 0.8 (the deductible portion for carriers), he could claim $14,160. (R. App. 9). But as he testified, he worked only four or five months in 2013 as an independent truck driver. (*Id.* at 5, 9, 80). At most, that is 153 days. Yet Demeke deducted *$13,208* for the 2013 tax year. Using the same calculations, Demeke would have had to work 280 days in a period of time lasting only 153 days. Unless Demeke has discovered time travel, his representations are fraudulent and he should not be permitted to further profit from those misrepresentations to the detriment of Lucky Cab.

### B. Lucky Cab Preserved This Issue for Appeal

Because the Board cannot refute that Demeke's meal deductions were not supported by substantial evidence, it instead argues that Lucky Cab waived this argument. First, the Board asserts that Lucky Cab filed no exceptions to the ALJ's findings regarding Demeke's meal calculations. (A.B. 360. The Board is wrong. Lucky Cab filed exceptions to the net backpay calculations (which necessarily include the

meal expenses) for both years in which he made the misrepresentations to the IRS:

> Lucky Cab excepts to the ALJ's findings and conclusions that Demeke's total amount of interim earnings in 2012 was $18,192, or an average of $350 per week, as well as the ALJ's related calculations of weekly net backpay and total net backpay for 2012 ($23,504).

(2 R. App. 88; *accord id.* at 88–89 (lodging the same exception for 2013)).

Second, the Board asserts that "any argument not raised in an opening brief is waived." But Lucky Cab addressed Demeke's misrepresentations and the resultant calculations in its Opening Brief, on pages 7, 8, 9, 13, and 14. The Board goes on to imply that, not only must Lucky Cab raise the substantive issues in its Opening Brief, but it must also affirmatively point to where it raised those issues below. This is not a requirement. The Board has questioned whether Lucky Cab raised the issue below, and Lucky Cab now replies showing that it did. This is the extent of Lucky Cab's obligation.

Because Demeke's misrepresentations to the Internal Revenue Service are not substantial evidence of anything, let alone an entitle-

ment to increased backpay (and assuming the Court rules that the drivers are entitled to an offset for meal deductions), the Court should remand with instructions to recalculate Demeke's backpay based upon evidence other than his own self-serving and fraudulent statements.

## III.

## GEBERSELASA DID NOT MAKE A REASONABLE EFFORT TO FIND SUBSTANTIALLY EQUIVALENT EMPLOYMENT

The Board both (1) improperly applied the law and (2) based its decision on something other than substantial evidence when it concluded that Geberselasa did not need to apply for available cab driver jobs that were, of course, substantially equivalent to her job as a cab driver with Lucky Cab. Lack of seniority and a waiting period for benefits are common when beginning a new job. It was an error for the Board to conclude that Geberselasa engaged in reasonable efforts to mitigate her losses by remaining unemployed for two years while cab driver jobs remained available. The Board's Petition should be denied.

### A. A Discriminatee Must Engage in an Honest, Good Faith Effort to Find Substantially Similar Employment

"[A] discriminatee is not entitled to back pay to the extent that [s]he fails to remain in the labor market [or] refuses to accept *substantially equivalent employment . . . .*" *N. L. R. B. v. Madison Courier, Inc.*, 472 F.2d 1307, 1317 (D.C. Cir. 1972); *accord Kawasaki Motors*, 850 F.2d at 528 (the Ninth Circuit adopting the same standard); *The Lorge Sch. & Linda Cooperman*, 355 NLRB 558, 561 (2010) ("[I]t is well established that a discriminatee's obligation to mitigate an employer's backpay liability requires only that the discriminatee accept substantially equivalent employment." (citation omitted)). Moreover, the sought-after employment must be "suitable to a person of [her] background and experience." *N. L. R. B. v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966). And the discriminatee must engage in "an honest good faith effort" to find suitable employment. *N.L.R.B. v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955).

"Substantially equivalent employment" is "employment which affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the position from

which the Title VII claimant has been discriminatorily terminated." *Sellers v. Delgado Cmty. Coll.*, 839 F.2d 1132, 1138 (5th Cir. 1988) (citing *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983)); *accord Ford Motor Co. v. E. E. O. C.*, 458 U.S. 219, 231–32 (1982) (holding that a discriminatee "forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied").

The Respondent has the burden to establish that the discharged employee failed to mitigate her losses by failing to seek substantially equivalent employment. *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978). The respondent satisfies this burden by showing (1) "that there were suitable positions available [i.e., substantially equivalent positions] which plaintiff could have discovered and for which [s]he was qualified; and (2) that plaintiff failed to use reasonable care and diligence in seeking such a position." *Id.* (collecting cases).

The Board essentially ignores the "substantially equivalent" standard. (*See generally* A.B.). In fact, it does not recite the standard anywhere in its Brief. (*Id.*). The Board's only reference to the standard is the odd assertion that "available cab driver positions were not substantially equivalent to her job [as a cab driver] at [Lucky Cab]." (*Id.* at

27 and surrounding text). It is difficult to imagine a job more substantially equivalent to being a cab driver than another job as a cab driver. Accordingly, the Board's hesitance to address this controlling standard is, perhaps, understandable. However, the Board then implies that "positions as a food runner, gourmet busser, porter, cocktail server, housekeeper, and limo driver" are substantially equivalent to a cab driver, while another job as a cab driver is not. (*Id.* at 22). This assertion is not grounded in the law.

### B. Geberselasa Did Not Engage in an Honest, Good Faith Effort to Obtain Substantially Equivalent Employment[5]

#### *1. Substantially Equivalent Positions Were Available*

The cab industry was hiring; a fact that the Board concedes. (A.B. 23 n.3 ("The Board found that the Company met its burden of showing that Frias and Whittlesea [other cab companies] were hiring drivers

[5] The Board implies that, because Lucky Cab does not appeal the backpay calculations of other discharged employees for failure to seek or maintain cab driver positions, it cannot now challenge Geberselasa's backpay on that same basis. It should go without saying that an appellant need not assert every available argument or fight every potential battle.

during the backpay period.")).[6] Indeed, two of the other discharged drivers (Hailu and Hambamo) were able to find and secure employment with other cab companies. (A.B. 10, 28; E.R. 12; S.E.R. 163–64 (showing Hailu's employment with Wittlesea)); (A.B. 13, 28; E.R. 4; S.E.R. 100–02 (showing Hambamo's employment with ANLV Cab, a Frias company)).

Thus, substantially equivalent positions were available.

#### a. A JOB CAN BE SUBSTANTIALLY EQUIVALENT EVEN IF THE APPLICANT MUST START WITH LESS SENIORITY AND LIMITED BENEFITS

A discriminatee may not refuse to seek or accept substantially equivalent employment simply because such employment would require her to accept a position with lower seniority. "The claimant, after all, plainly would be required to minimize h[er] damages by accepting an-

[6] The Board recognizes that these two cab companies were hiring drivers, but attempts to deflect from this fact by arguing that Lucky Cab did not prove "that any of the numerous Las Vegas taxi services other than Frias and Whittlesea were hiring." (A.B. 23 n.3). Though it is likely, if not certain, that other cab companies were also hiring, Lucky Cab need not establish that every cab company in the area was hiring. It has met its burden by showing, with "substantial evidence," that substantially equivalent positions were available.

other employer's offer even though it failed to grant the benefits of seniority not yet earned." *Ford Motor Co.*, 458 U.S. at 232–33. Where the lack of seniority reduced the discriminatee's income or benefits, her recourse is to seek "compensation for any losses suffered as a result of h[er] lesser seniority before the court's judgment." *Id.* at 233–34.

The Board cites to no case supporting its argument that a job is not substantially equivalent solely because the applicant loses seniority or must wait a prescribed time-period for benefits to attach. Many jobs have similar waiting periods. In fact, this appears to be the norm for cab companies. (*See* R. App. 4). If the Board's purported exception existed, it would nearly swallow the rule requiring a discriminatee to seek substantially similar employment.

Thus, the Board's finding that the available cab driver positions were not substantially equivalent is not supported by substantial evidence.

### *2. Geberselasa Failed to Use Reasonable Care and Diligence in Seeking Substantially Similar Employment*

It is undisputed that Geberselasa refused to even apply for a job at another cab company. (R. App. 33 (stating that "I didn't apply at any

other cab companies")). Her only excuse was that she did not like the "process" of starting at another cab company. (*Id.*). As addressed above, however, a lack of seniority at the start of employment is not a sufficient basis to decline substantially similar employment. (*Supra* Part III.B.1.a). And, in view of the entire circumstances, it certainly does not justify remaining willfully unemployed for two years, during which time she would have almost certainly overcome the lack of seniority. At the very least, seeking and accepting this substantially equivalent employment would have mitigated her damages while she continued to look for other employment.

The Board's conclusion that one cab driver position was not substantially equivalent to another is not supported by substantial evidence. And the Board incorrectly applied the law when it determined that Geberselasa did not need to seek available jobs that were substantially equivalent to the one at Lucky Cab.

### C. The Board Again Supports Its Strained Position with Inapposite Caselaw

Once again, the Board's cited authority is not helpful. For example, the Board cites to *De Jana Indus., Inc. & Local 813, Int'l Bhd. of*

*Teamsters, Afl-Cio*, 305 NLRB 845 (1991), for the proposition that discriminatees need not "seek precisely the same type of employment." (A.B. 25). There, the discriminatee was a driver for the respondent before being discharged. *De Jana Indus.*, 305 NLRB at *1. However, because he did not have a driver's license, it was *impossible* for him to find precisely the same type of employment. *Id.* Nevertheless, the Board recognized that he could seek employment as "a truckdriver's helper, a position he had held in the past" and one which was substantially equivalent to the job he held with the respondent. *Id.* at *2 n.6. Here, there is nothing indicating that Geberselasa was prohibited from seeking another job driving a cab.

The Board also relies on *Fugazy Cont'l Corp.*, 276 NLRB 1334 (1985), (A.B. 25), but again, the circumstances there are not analogous. For example, the Board found that one employee was not required to seek another similar job as a limousine driver. *Fugazy*, 276 NLRB at *11. However, unlike here, that employee mitigated his damages by "work[ing] in every quarter, except one, during the critical period" and thus "his actions [did not] constitute a willful loss of earnings." Here,

Geberselasa remained unemployed for two years without seeking a substantially equivalent job as a cab driver. (R. App. 3). Unlike the employee in *Fugazy*, Geberselasa failed to mitigate her damages.

## CONCLUSION

For the foregoing reasons, the Court should deny the NLRB's petition for enforcement of the Board's Order or, alternatively, amend the Board's order to reflect the proper backpay due.

Dated this 5th day of April, 2019.

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of FRAP 32(a)(7) because it contains 4582 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

Dated this 5th day of April, 2019.

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 5, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*s/Adam Crawford*
An Employee of Lewis Roca Rothgerber Christie LLP